

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Jonas Miller,

Petitioner,

v.

Case No. 2:09-cv-720

**Warden, Noble Correctional
Institution,**

**Judge Michael H. Watson
Magistrate Judge Abel**

Respondent.

ORDER

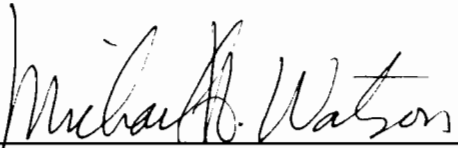
On January 19, 2011, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed. ECF No. 14. Petitioner has filed objections to the Magistrate Judge's *Report and Recommendation*. ECF No. 16. For the reasons that follow, Petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

Petitioner objects to certain findings of fact of the state appellate court. He again argues that application of *State v. Foster*, 109 Ohio St. 3d 1 (2009), in the trial court's imposition of maximum, non-minimum, consecutive terms of incarceration violated due process and the Ex Post Facto Clause. Additionally, he contends that the Magistrate Judge improperly recommended dismissal of claims two, three and four as procedurally defaulted where prison officials were at fault in not timely mailing his application for reconsideration under Ohio Appellate Rule 26(B), which the state appellate court dismissed as one day late.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review and Petitioner's arguments are unavailing. The facts referred to by Petitioner are presumed to be correct under 28 U.S.C. § 2254(e), and in any event, have no impact on the basis for the Magistrate Judge's recommendation of dismissal of his claims. For the reasons detailed by the Magistrate Judge, this Court agrees that Petitioner's sentence was not unconstitutionally imposed. Further, it appears from the record that Petitioner never raised, as cause for the untimely filing of his Rule 26(B) application in the state courts, a claim that prison officials had improperly delayed the mailing of his Rule 26(B) application. Moreover, this allegation is without record support.

WHEREUPON, Petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT